

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000045-001 DT

06/05/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

STACY R VANORSKI (001)

CANDY MARRUFO

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-0751-SC-2013-026931.

Defendant-Appellant Stacy R. Vanorski (Defendant) was convicted in Scottsdale Municipal Court of prostitution and several city code charges. Defendant contends the trial court erred in not suppressing the State's evidence as a discovery sanction, and erred in denying her request for a jury trial. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 4, 2013, Defendant was cited for prostitution, A.R.S. § 13-3214(A) and several city code charges dealing with performing a massage. On August 25, 2014, Defendant's attorney filed a Rule 15.7 Motion To Preclude Testimony as a Sanction for Failure To Preserve Evidence alleging the police had failed to preserve the recording from the police recording device. On August 28, 2014, Defendant's attorney filed a Motion for a Jury Trial. On August 29, 2014, the State filed a Response to Defendant's Rule 15.7 Motion To Preclude Testimony, and on September 5, 2014, Defendant's attorney filed a Reply. On September 5, 2014, the trial court denied Defendant's Motion for a Jury Trial.

Prior to the trial in this matter, the trial court did not hold an evidentiary hearing on Defendant's Motion To Preclude Testimony and instead heard arguments from the attorneys. Defendant's attorney noted Detective Crawford was the undercover officer who went into the building and was wearing a transmitter. (R.T. of Sep. 30, 2014, at 5.) He noted some of the officers said the device stopped transmitting when Det. Crawford entered the building; some said it stopped transmitting when Det. Crawford went into the massage room; and some said it stopped transmitting when Det. Crawford took off his pants. (*Id.* at 6.) The prosecutor noted the officers said the device

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stopped transmitting when Det. Crawford entered the building. (*Id.* at 11.) In response to the trial court's question, the prosecutor clarified that Det. Crawford had on him a transmitting device, and the officers outside in the undercover van had the recording device. (*Id.* at 12.) The other officers said they stopped receiving transmissions once Det. Crawford went into the building, thus there was nothing for them to record at that point. (*Id.* at 13.) Defendant's attorney said "Detective Crawford believes it stopped working when he took his pants off." (*Id.* at 15.) The following exchange then occurred:

THE COURT: Well, would you—would you agree, counsel, that if it happened when he took his pants off, then it wouldn't have recorded anything pertinent to this—to these charges?

MR. TELLES [Defendant's attorney]: I would agree with that.
(R.T. of Sep. 30, 2014, at 15.) After hearing further arguments, the trial court denied Defendant's motion:

THE COURT: Thank you, Counsel.

I find that there's no showing of bad faith, as the prosecution had no duty to preserve non-evidence. I believe both parties agree that if the device, which does not record and couldn't have preserved anything, stopped when Detective Crawford took his pants off, that none of that would be material to the charges.

There's no showing that the evidence would have been exculpatory. And the mere possibility that destroyed evidence might be exculpatory is insufficient as a due process violation. Consequently, there's no prejudice to the defense pursuant to *State v. O'Dell*, citing *Arizona v. Youngblood* and *State v. Youngblood*.

Even if the receiver should have been preserved and turned over to the defense, the remedy for that is not the preclusion of the State's most vital witness, Detective Crawford. His testimony was disclosed. And, consequently, because of the lack of bad faith in the fact that there's no testimony of anybody who overheard it, I'm denying defense counsel's motion.

(R.T. of Sep. 30, 2014, at 17–18.) The trial court affirmed that it had denied Defendant's request for a jury trial. (*Id.* at 18.)

The trial began and the State presented the testimony of its witnesses. (R.T. of Sep. 30, 2014, at 20, 72.) Defendant's attorney then made a motion for judgment of acquittal, which the trial court denied. (*Id.* at 84, 89–90.) Defendant then testified. (*Id.* at 90.)

After hearing arguments from the attorneys, the trial court found Defendant guilty of all charges. (R.T. of Sep. 30, 2014, at 128.) The trial court then imposed sentence. (*Id.* at 129–30.) On October 8, 2014, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

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II. ISSUES.

A. *Did the trial court abuse its discretion in not suppressing the State's evidence.*

Defendant contends the trial court abused its discretion in not suppressing the State's evidence as a discovery sanction. A trial court has the authority under Rule 15.7 of the Arizona Rules of Criminal Procedure to impose a sanction for a discovery violation, but first there must be a discovery violation. According to Defendant's attorney, Det. Crawford thought the device stopped transmitting once he took his pants off, but Defendant's attorney acknowledged nothing that might have been recorded prior to that point would have been pertinent to these charges. (R.T. of Sep. 30, 2014, at 15.) Moreover, the other officers thought the device stopped transmitting either when Det. Crawford went into the building or went into the hallway leading to the back rooms, so in either case nothing would have been transmitted that was pertinent. It thus appears the device did not transmit anything pertinent, so there was no recording that contained anything the State was required to disclose. And because there was nothing the State was required to disclose, there was no basis for the trial court to impose any sanctions. The trial court therefore did not abuse its discretion in not suppressing the State's evidence as a discovery sanction.

B. *Did the trial court err in denying Defendant's request for a jury trial.*

Defendant contends the trial court erred in denying her request for a jury trial. To determine whether the offense mandates a jury trial, the trial court must *first* consider under Article 2, section 23, whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood. *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 9–12, 36 (2005). For the charges in question, Defendant acknowledges they were not criminalized at common, thus this part of the test does not apply.

To determine whether the offense mandates a jury trial, the trial court must *second* consider under Article 2, section 24, the severity of the possible penalty; if the offense is classified as a misdemeanor punishable by no more than 6 months incarceration, the court will presume the offense is one for which the defendant is not entitled to a jury trial. *Derendal* at ¶¶ 13–26, 37. The present offenses are misdemeanors punishable by no more than 6 months incarceration, thus presumption is the offenses are ones for which Defendant was not entitled to a jury trial.

To rebut this presumption, the defendant must establish three elements. The *first* is that the penalty must arise directly from Arizona law. *Fushek v. State*, 218 Ariz. 285, 183 P.3d 536, ¶ 11 (2008). For the charges in question, the penalties arise directly from Arizona law.

The *second* element the defendant must establish is that the consequences must be severe. *Fushek* at ¶ 11. In *Buccellato v. Morgan*, 220 Ariz. 120, 203 P.3d 1180 (Ct. App. 2008), the defendant was charged with city code provisions prohibiting (1) working as an adult service provider without obtaining the necessary permit, (2) working on a stage too close to the audience, (3) placing money on the person or in the costume of a person while that person was nude; defendant claimed the additional penalty was the city could revoke his license if he had three convictions. The court concluded revocation was not sufficiently severe to entitle the defendant to a jury trial. *Buccellato* at ¶¶ 14–16. In the present case, the penalty would not be sufficiently severe to entitle Defendant to a jury trial.

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The *third* element the defendant must establish is that the consequences must apply uniformly to all persons convicted of that particular offense. *Fushek* at ¶ 11. In *Buccellato*, because the penalty applied only to those who had three or more convictions, the penalty did not apply uniformly to all persons, thus the defendant was not entitled to a jury trial. *Buccellato* at ¶¶ 17–20. In *State v. Willis*, 218 Ariz. 8, 178 P.3d 480 (Ct. App. 2008), the defendant was convicted of first-degree criminal trespass, which was a domestic violence offense and meant the defendant would be subject to minimum of 4 months incarceration if convicted of two or more domestic violence charges in the future. Because that additional punishment would apply only to persons convicted of additional domestic violence offenses in the future, it would not necessarily apply to all persons presently convicted of a domestic violence offense, and because that potential punishment would not affect all persons equally, this potential punishment did not entitle the defendant to a jury trial. *Willis* at ¶ 17. In *Stoudamire v. Simon*, 213 Ariz. 296, 141 P.3d 776 (Ct. App. 2006), the defendant was convicted of possession of marijuana and argued conviction could cause the denial of a professional license in the future. The court held this consequence would not apply to a person who never applied for a professional license, thus it did not apply uniformly to all persons convicted of this offense. *Stoudamire* at ¶ 12. In the present case, Defendant notes she lost her license to work as a massage therapist and she will not be able to qualify for a fingerprint card and thus will not be able to work as a nurse. Those additional punishments do not, however, apply to all persons, thus those additional punishments do not entitle Defendant to a jury trial.

III. CONCLUSION.

Based on the foregoing, this Court concludes there was no discovery violation, thus the trial court did not abuse its discretion in not imposing a discovery sanction, and further concludes the trial court correctly determined Defendant was not entitled to a jury trial.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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